Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

AARON DAVID WEINBERGER, as Administrator of the Estate of JEREMIAH BENJAMIN WEINBERGER; AARON DAVID WEINBERGER, as father of Jeremiah Benjamin Weinberger,

Petitioner,

vs.

THE STATE OF WISCONSIN, PROBATION OFFICER DONNA CHESTER and as yet unnamed probation officers and employees,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTIONS PRESENTED

1. Whether this Court should review the unprecedented use of the "Nuremberg defense" *("I was only following orders")* via which the 7th Circuit rejected Plaintiff's claim that Donna Chester, Jeffrey Dahmer's probation officer, could be found actionably reckless under the Civil Rights Act, 42 U.S.C. 1983, for accepting 121 cases involving high-risk sexual offenders and therefore not making statutorily-required home visits, which endangered Plaintiff's son - a member of an identifiable class at greater risk of harm from a sexual predator - by precipitating the action of Jeffrey Dahmer.

2. Whether the District Court erred in (a) dismissing the *pro se* case

against defendants "as yet unnamed probation officers and employees" and (b) denying plaintiff the opportunity to amend to add additional defendants, in conflict with decisions of this Court [e.g., Hughes v. Rowe, 449 U.S. 5, 9-10 (1980); accord, Estelle v. Gamble, 419 U.S 97, 106 (1976); Haines v. Kerner, 404 U.S. 519 (1972); see also Foman v. Davis, 371 U.S. 178, 182 (1962)], which militate in favor of granting leave to amend in such circumstances.

3. Whether summary judgment against Plaintiff was improperly affirmed where, in holding that Plaintiff submitted no evidence from which a jury could find "recklessness" (Op. p. 10), and in approving the District Court's finding that Plaintiff failed to establish "the

establish "the basic causal premise that his son would not have been killed if Dahmer had not had the privacy of his apartment and the knowledge that he would not have been interrupted by a visit from his probation officer" (Op. p. 7), the 7th Circuit improperly ignored the existence in the Record of two uncontradicted Affidavits from expert witnesses that furnish evidence of each of these elements (recklessness and causation) from which a jury could find each of these elements.

4. Whether the 7th Circuit's finding that Donna Chester had "qualified immunity" is wrong, since her actionable conduct was objectively unreasonable and there is no discretionary act immunity as there

is a clearly established duty to protect members of the target class from increased risk of harm.

5. Whether the Complaint was dismissed in violation of due process of law by application of Wisconsin legislation making strict compliance with the statutory notice requirement a jurisdictional prerequisite to a suit against the State (Wisc.Stat.Ann. § 893.82), while actual notice (which was given here) - even absent strict compliance with the notice requirement - is expressly sufficient to maintain a suit against any other governmental unit/agency (§ 893.80(1)).

(1b) PARTIES INVOLVED

Petitioner, Aaron David Weinberger, was the Plaintiff in the U.S. District

Court for the Western District of Wisconsin, and Appellant in the U.S. Court of Appeals for the 7th Circuit.

Respondents, State of Wisconsin, Probation Officer Donna Chester, and as yet unnamed probation officers and employees, were the defendants in the District Court and appellees in the 7th Circuit.

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1. This Court should review the unprecedented use of the "Nuremberg defense" *("I was only following orders")* via which the 7th Circuit rejected Plaintiff's claim that Donna Chester, Jeffrey Dahmer's probation officer, could be found actionably reckless under

the Civil Rights Act, 42 U.S.C. § 1983 for accepting 121 cases involving high-risk sexual offenders and therefore not making statutorily-required home visits, which endangered Plaintiff's son - a member of an identifiable class at greater risk of harm from a sexual predator - by precipitating the action of Jeffrey Dahmer. 14

2. In (a) dismissing the *pro se* case against defendants "as yet unnamed probation officers and employees" and (b) denying plaintiff the opportunity to amend to add additional defendants, this decision is in conflict with decisions of this Court [e.g., Hughes v. Rowe, 449 U.S. 5, 9-10 (1980); accord, Estelle v. Gamble, 419 U.S 97, 106 (1976); Haines v. Kerner, 404 U.S. 519 (1972); see also

Foman v. Davis, 371 U.S. 178, 182 (1962)], which militate in favor of granting leave to amend in such circumstances. 20

3. Summary judgment against Plaintiff was improperly affirmed where, in holding that Plaintiff submitted no evidence from which a jury could find "recklessness" (Op. p. 10), and in approving the District Court's finding that Plaintiff failed to establish "the basic causal premise that his son would not have been killed if Dahmer had not had the privacy of his apartment and the knowledge that he would not have been interrupted by a visit from his probation officer" (Op. p. 7), the 7th Circuit improperly ignored the existence in the Record of two uncontradicted

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4. The District Court's finding that Donna Chester had "qualified immunity" is wrong, since her actionable conduct was objectively unreasonable and there is no discretionary act immunity as there is a clearly established duty to protect members of the target class from increased risk of harm. 27

5. The Complaint was dismissed in violation of due process of law by application of Wisconsin legislation making strict compliance with the statutory notice requirement a jurisdictional prerequisite to a suit

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Petitioner, AARON DAVID WEINBERGER, ("Plaintiff"), prays that a Writ of Certiorari issue to review the judgment of the 7th Circuit Court of Appeals.

Judgment and Opinion Below

The Opinion of the 7th Circuit, not yet reported, is set out as App. A.

Jurisdictional Statement

On January 31, 1997, the Court of Appeals for the 7th Circuit filed its Opinion (App. A) affirming the District Court's judgment. Petition for Rehearing and Suggestion for Rehearing En Banc, timely filed, was denied April 17, 1997. (App. B) This Petition for Certiorari is timely filed within 90 days thereafter. Jurisdiction is invoked under 28 U.S.C. § 1254(a) and Rules 10.1, 12.1, & 13.1 of this Court.

Constitutional Provision

The 14th Amendment to the U.S. Constitution provides:

> "Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Plaintiff filed a *Pro Se* Civil

Rights Act Complaint, alleging that the civil rights (due process) of his son - a murder victim of Jeffrey Dahmer, and a member of an identifiable class at risk of harm from Dahmer - were violated by the defendants, State of Wisconsin and Probation Officer Donna Chester and other probation staff, when their conduct with respect to high-risk probationer Jeffrey Dahmer, caused and precipitated Dahmer's murderous conduct.

Defendants' Motion for Summary Judgment (R. 8) was granted, and the case against the "as yet unnamed probation officers and employees" was dismissed for Plaintiff's failure expeditiously to identify them. (R. 45)

A panel of the Court affirmed (App. A), and rehearing was denied. (App. B)

Statement of Facts

Jeffrey Dahmer was convicted and sentenced in 1989 for a 1988 sexual assault[1] on a 13-year-old male member of a minority. At sentencing, consecutive sentences of 5 and 3 years were imposed and stayed, and he was placed on probation for concurrent five year terms (R. 10, pp. 1-2, par. 4); conditions included that he serve one year in the Milwaukee House of Correction work release program, receive alcohol treatment, and have no contact with anyone under 18 years of age. (R. 10, pp. 1-2, par. 4) At sentencing, the prosecutor told Judge William D.

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[1] More particularly: "second degree sexual assault and enticing a child for immoral purposes, both with a thirteen year old boy ..." (R. 45, p. 3) on Sept. 26, 1988. (R. 10, p. 1, par. 4)

Gardner:

> "[I]n my judgment, it is absolutely crystal clear that the prognosis for treatment of Mr. Dahmer within the community is extremely bleak and the reality is that *treatment within the community is just plain not going to work*. That's absolutely clear from every single professional who's looked at Mr. Dahmer; and the reality is that *his track record exhibits that he is very likely to reoffend*." (Emphases added.) (Ex. 6 to R. 34)

He spent 10 months in custody and in March 1990, was released on probation. Donna Chester became his probation officer (R. 10, par. 1),[2] "in late March or April, 1990, upon his release . . ." (Par. 6; see also R. 45,

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[2] Unless otherwise identified, paragraph references are to Affidavit of Donna Chester (R. 10), in support of Defendants' Motion for Summary Judgment. (R. 8)

p. 3.) Donna Chester's education was a bachelor of science degree. (Par. 2) She had no prior work experience, and only four (4) weeks of training before commencing having a caseload. (Par. 2) She took on 121 cases [that is, people] of high risk offenders.[3]

Donna Chester knew that Jeffrey Dahmer, and her other probationers, had high potential to repeat sexual offenses. She stated in her Affidavit:

> "My clients were all deemed to be 'high risk' and 'dangerous' because they were all sex offenders. . . . There is a statistical certainty that some probationers and parolees will repeat or escalate their criminal activity, but no one knows in advance specifically who. This statistical certainty was even

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[3] 121 were non-incarcerated; she also had 25 additional institutionalized persons to supervise, for a grand total of 146 high-risk offenders. (R. 45, p. 4; also, par. 7.)

higher for my caseload because they were all of higher risk." (Par. 48)

A national Standard for Probation Officers requires no more than 2.5 workload hours per person per month on maximum security level persons such as all those in her case load. (Ex. 1 to R. 34.) According to Warner T. Hughes,[4] as per Illinois and national standards concerning the supervision of serious offenders, such as child abuse and/or sexual offenders, with which standards he is familiar (R. 36, p. 1, par. 5),

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[4] The uncontroverted Affidavit of Warner T. Hughes (R. 36, App. 107-08), a Supervisor of probation officers for 25 of his 35 years with the Cook County [IL] Probation Dept. (R. 36, pars. 1-2, App. 107-08), was submitted by Plaintiff in support of his Response in opposition to defendants' Summary Judgment Motion. (R. 34) Notably, it is not mentioned in the District Court's Order (R. 45) nor in the Opinion (App. A).

the maximum reasonable case-load of such persons for any single probation officer, is 50. (R. 36, p. 1, par. 6) Therefore, Mr. Hughes concludes, "For a probation officer to have assigned and/or for the probation officer to handle 121 cases of sexual offenders and/or child abuse sexual offenders is excessive. To assign or to accept such a case load is reckless." (R. 36, pp. 1-2, par. 6)

The Wisconsin statutes required Donna Chester to make home visits of her probationers. (Ex. 1 to R. 10; see par. 43.) Because of her case load, she did not make these statutorily mandated home visits. (Pars. 43, 44, 46, 47) She averred:

> "Prioritizing was, to some extent, done for me by circumstances. That

> ~~is, certain of my tasks like pre-~~ sentence reports, custody reports, court appearances, probation/parole revocations, and other mandatory paperwork have a definite schedule or deadlines that must be honored. The paperwork requirements of my job are enormous, and they cannot be ignored or delayed." (Par. 47)
>
> "One of the primary reasons for seeking waiver of Dahmer home visits is a compelling need to prioritize activities when faced with insufficient time to do all that could be done for the clientele. . . . (Par. 46)

Plaintiff presented uncontroverted expert psychiatric opinion evidence that Dahmer's obsession was to lure young men into his private dwelling, where he would proceed to injure and kill them, having sex with their dead or dying bodies; and that in order to carry out these criminal activities, Dahmer knew that he had to have a private place to commit such acts, and also, a private

place in which to store the bodies and body parts. Aff. of Robert M. Galatzer-Levy, M.D. (R. 35, pp. 2-3, par. 3) Dahmer understood that without such a space, he was at grave risk of being caught. (*Ibid.*) "[T]he unavailability of such a space would have strongly deterred him [Dahmer] from his actions." (*Ibid.*) As concluded in Dr. Galatzer-Levy's Affidavit, Dahmer's mental situation was such that a private place, such as his apartment, was absolutely essential for him to continue his criminal activities. Dr. Galatzer-Levy based his uncontroverted expert psychiatric opinion on uncontroverted reports of court-appointed psychiatrists and psychologists who had examined Dahmer on the issue of sanity for the

purpose of the criminal trial. (Grp. Ex. B to R. 35[5])

The Report of Park Elliott Dietz, M.D., M.P.H., Ph.D. (Grp. Ex. B, # 2), detailed Dahmer's self-professed sexual proclivities, that depended on his having power over a zombie or comatose sexual partner, failing his ideal of having a living sexual partner who would willingly allow Dahmer full control over their sexual activities; "He never met anyone with whom he thought he could develop such a relationship." (Grp. Ex. B, # 2, p. 2) "Mr. Dahmer's subjective experience of his sexual preference is that he desires sexual access to an attractive male partner who is under his

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[5] Reference to Grp. Ex. B is to the 5-item attachment to the Affidavit of Robert M. Galatzer-Levy, M.D. (R. 35)

complete control and who will not leave him." (*Ibid.*) Not being able to find such a person, he performed criminal acts upon his victims after rendering them comatose or semi-comatose. (*Ibid.*) In concluding that Dahmer was "sane," Dr. Dietz stated:

> "(c) the fact that Mr. Dahmer in each instance committed the charged offense *in a private setting*, hidden from the view of others;***
>
> (e) the fact that Mr. Dahmer feared being caught in the act . . . (f) the fact that Mr. Dahmer took elaborate steps to destroy evidence of his crimes or to hold it secure against discovery by others, including . . . *securing his apartment*, ..." (Grp. Ex. B, # 2, p. 7) (Emphasis added.)
>
> "(f) the fact that Mr. Dahmer prepared himself for some of the murders by *clearing space in his apartment for victim storage*, . . . (h) the fact that Mr. Dahmer *did not kill any of the men he was attracted to while in bars, on the street, at the mall, in the peep show booths of pornographic*

> *bookstores, or in bathhouses . . . but rather controlled himself unless and until the circumstances were more opportune for promoting privacy and evading detection;* (i) the fact that Mr. Dahmer did not kill those men whom he found attractive and had rendered unconscious even after lowering his own inhibitions through drinking where the bathhouse setting would preclude readily escaping detection; . . . (l) the fact that *Mr. Dahmer did in each instance wait until the victim was in his place of residence, under his control, and behind closed doors before killing the victim.*" (Grp. Ex. B, # 2, p. 8) (Emphasis added.)

The Report of George B. Palermo, M.D. (Grp. Ex. B, # 4), includes:

> " . . . He described how he obtained all the necessary items for such heinous crimes and how *he decided to secure his apartment with a high quality security system.*" (Grp. Ex. B, # 4, p. 5) (Emphasis added.)

On [or about] July 6, 1991, Jeffrey Dahmer lured Plaintiff's son, a young minority group member - black homosexual

- to his apartment, and killed him. (R. 45, p. 3)

REASONS FOR GRANTING CERTIORARI

1. This Court should review the unprecedented use of the "Nuremberg defense" *("I was only following orders")* via which the 7th Circuit rejected Plaintiff's claim that Donna Chester, Jeffrey Dahmer's probation officer, could be found actionably reckless under the Civil Rights Act, 42 U.S.C. § 1983, for accepting 121 cases involving high-risk sexual offenders and therefore not making statutorily-required home visits, which endangered Plaintiff's son - a member of an identifiable class at greater risk of harm from a sexual predator - by precipitating the action of Jeffrey Dahmer.

Without citing precedent, the 7th Circuit sets up a "Nuremberg defense" *[i.e., "I was only following orders"]* as an absolute bar to a Civil Rights Act suit alleging reckless violation by a State official - Jeffrey Dahmer's probation officer - of Plaintiff's

deceased son's right to life under the due process clause of the 14th Amendment.

Donna Chester, an inexperienced probation officer (R. 10, pars. 2, 3, 6) was assigned, and accepted, a caseload of 121 sex offenders (R. 45, p. 4; par. 7) - all of whom, she recognized, were high-risk offenders with great potential to repeat similar crimes (par. 48); she accepted them recklessly, where national professional standards would require that she supervise no more than 50 such probationers (R. 36, pp. 1-2, par. 6); it was impossible, because of her caseload, to adequately supervise all her probationers (see pp. 8-9, supra); she knew that because of their high potential to repeat crimes, at risk was

a category of potential victims of a sex offender, and as to Jeffrey Dahmer, the potential victims were young homosexual males; that because of the recklessness of accepting such a large caseload, Chester was unable to, and chose not to, properly supervise her clients, and chose not to make home visits to Dahmer and chose not to supervise Dahmer adequately; since there were no home visits - and Dahmer could reasonably anticipate that there would be none - this enabled and precipitated Dahmer's killings, because his obsession was to lure young men into his private dwelling, to injure and kill them - and he would not have killed if he did not have such a safe place to secure his victims.

The alleged facts - supported by Affidavits - can sustain a Civil Rights action under 42 U.S.C. § 1983, because (i) Chester's reckless conduct placed Plaintiff's son in danger that he would not have faced, if not for such recklessness, (ii) Chester's reckless conduct caused, enabled and precipitated Dahmer's harm to Plaintiff's son, (iii) Plaintiff's son was a member of a special, definable group (young, minority homosexual males), distinguishable from the public at large, Nishiyama v. Dickson County, 814 F.2d 277 (6 Cir. 1987) (*en banc*); Cornelius v. Town of Highland Lake, Ala., 880 F.2d 348 (11 Cir. 1989); and (iv) Dahmer, being on probation, was "in custody" when he killed Plaintiff's son.

Defendants cannot find solace in DeShaney v. Winnebago County Social Services Dep't, 489 U.S. 189 (1989), and Martinez v. California, 444 U.S. 277 (1980), because due process protects special groups of citizens from reckless acts of government, that cause and precipitate citizens to harm other citizens, and where government officials would reasonably know that their failure to properly act would put a specific class of persons in jeopardy, and here, as alleged, Chester's acts precipitated Dahmer's actions and Plaintiff's son was part of a recognizable special group that Chester knew she put at risk.

Here, the 7th Circuit affirmed the District Court's grant of summary judgment by holding that recklessness in

fact is not recklessness in law, when the reckless person is following orders of her superior (App. A, pp. 10-11):

> "[O]fficer Chester properly submitted requests for home-visit waivers to her supervisor, James Wake (who is not a defendant). Supervisor Wake approved and executed the waivers after considering such factors as favorable supervision adjustment, stability of residence, *agent workload* and potential danger to the agent." (App. A, p. 10) (Emphasis added.)

This defense - "I only did as I was told; I was following orders" - as advanced by Nazi war criminal defendants, has been rejected by the community of civilized society at the Nuremberg trials. There is no room for the Nuremberg defense in the context of Civil Rights Act litigation - especially where the superiors have been put beyond the reach of the law by the lower

court's refusal to allow Plaintiff to add them as party defendants. (See Point 2.) The "following orders" defense in its present form, as adopted here by the 7th Circuit without precedent and without citation of authority, calls for this Court's scrutiny via certiorari.

2. In (a) dismissing the case against defendants "as yet unnamed probation officers and employees" and (b) denying plaintiff the opportunity to amend to add additional defendants, this decision is in conflict with decisions of this Court [e.g., Hughes v. Rowe, 449 U.S. 5, 9-10 (1980); accord, Estelle v. Gamble, 419 U.S 97, 106 (1976); Haines v. Kerner, 404 U.S. 519 (1972); see also Foman v. Davis, 371 U.S. 178, 182 (1962)], which militate in favor of granting leave to amend in such circumstances.

The 7th Circuit's ultimate reliance on the Nuremberg defense is doubly egregious here, because while pointing out that Supervisor James Wake is not a

defendant, that Court has approved the District Court's refusal to allow Plaintiff to amend the Complaint to make Wake a defendant.[6]

While Plaintiff was acting *pro se*, the District Court improperly refused to allow him to add said supervisor as an

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[6] Plaintiff's uncontroverted averments (R. 31) reasonably explained failure to made a timely motion to amend (R. 31, par. 2, pp. 1-6) - he had been without counsel and unable to obtain counsel, until finally enlisting undersigned; while *pro se*, he was unable to function as counsel re technical matters such as compliance with the scheduling order; and compelling and unavoidable personal reasons [including religious holidays; wife's illness, and mother-in-law's terminal illness and death; emotional inability to take active procedural role due to inherent emotional overload/aftershock due to nature of case and his emotional reaction to horror of situation] accounted for failure to have complied with the scheduling order. (R. 31, par. 2 (A) through (E), pp. 2-6)

additional defendant.[7] The decision (App. A, pp. 10-11) conflicts with decisions of this Court, including Hughes v. Rowe, 449 U.S. 5, 9-10 (1980); Estelle v. Gamble, 419 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519 (1972); see Foman v. Davis, 371 U.S. 178, 182 (1962); accord, Maclin v. Paulson, 627 F.2d 83 (7 Cir. 1980); Donald v. Cook County Sheriff's Dept., 95 F.3d 548 (7 Cir. 1996), by finding it

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[7] This Motion (R. 20) specifically named and identified two new defendants: James Wake, Donna Chester's supervisor, who authorized the waiver of home visits (see par. 44; Def. Exs. 3-6 to R. 10), and Aaron Kasprzak, Head of Probation and Parole for Region 3, State of Wisconsin, who allowed probation staff (such as Donna Chester) to be overloaded and overworked. James Wake's existence and identity first surfaced in this cause in the State's pleadings and Exhibits on the MSJ. (See R. 9, p. 2; par. 44.)

was not an abuse of discretion for the District Court to refuse to allow Plaintiff [then *pro se*] to add the said superior as an additional party defendant. (App. A, p. 8, fn. 2) This result is contrary to the holding of Maclin v. Paulson, 627 F.2d at 87-88, *accord*, Donald, 95 F.3d at 555-60 - which is compelled by Hughes, Estelle and Haines, supra - that there is a judicial obligation to assist a *pro se* Civil Rights Act plaintiff in ascertaining the identities of official defendants in a Civil Rights Act setting, because the means of so doing are beyond the reach of the layman without the help of the Court, and that leave shall liberally be allowed to amend to name additional defendants

after their identities are ascertained. Certiorari should be granted to clarify the duty of the District Court to aid *pro se* Civil Rights Act Plaintiffs.

3. Summary judgment was improperly entered against Plaintiff where, in holding that Plaintiff submitted no evidence from which a jury could find "recklessness" (Op. p. 10), and in approving the District Court's finding that Plaintiff failed to establish "the basic causal premise that his son would not have been killed if Dahmer had not had the privacy of his apartment and the knowledge that he would not have been interrupted by a visit from his probation officer" (Op. p. 7), the 7th Circuit improperly ignored the existence in the Record of two uncontradicted Affidavits from expert witnesses that furnish evidence of each of these elements (recklessness and causation) from which a jury could find each of these elements.

Plaintiff's theory of liability based on recklessness was rejected:

> "In our view, the record simply will not support a determination that Officer Chester's conduct was reckless." (App. A, p. 10)

This utterly ignores the existence in the Record of the uncontradicted Affidavit of Warner T. Hughes (R. 36)[8] (see pp. 7-8 above):

> "For a probation officer to have assigned and/or for the probation officer to handle 121 cases of sexual offenders and/or child abuse sexual offenders is excessive. To assign or to accept such a case load is reckless." (R. 36, pp. 1-2, par. 6)

Contrary to the finding that Plaintiff failed to establish causation between defendants' conduct and the death of his son, there was in the Record, an uncontradicted Affidavit of a psychiatrist (R. 35) who read all available interviews of Dahmer by court-

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[8] Both the District Court and the 7th Circuit conveniently avoided any reference to such evidence presented by Plaintiff via affidavit in opposition to Summary Judgment.

appointed experts, opining that a private place such as Dahmer's apartment was absolutely essential for him to continue his criminal activities - (see pp. 9-13, *supra*; Galatzer-Levy Aff.; R. 35)[9] - so that a jury could have determined that absence of home visits precipitated Dahmer's actions.

The decision is contrary to principles of Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and Kodak v. Image Technical Services, 504 U.S. 451, 456 (1992), calling for denial of summary judgment.

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[9] This Affidavit as to causation, like that of Hughes as to recklessness, was not even mentioned by the 7th Circuit or the District Court, both of which courts acted as if neither of these Affidavits existed.

4. The District Court's finding that Donna Chester had "qualified immunity" is wrong, since her actionable conduct was objectively unreasonable and there is no discretionary act immunity as there is a clearly established duty to protect members of the target class from increased risk of harm.

The 7th Circuit erroneously held that Donna Chester had discretionary act immunity. (App. A, p. 12)

As to an individual claiming immunity due to her role as a governmental official, the bottom-line test is: Objective unreasonableness - **regardless of subjective good faith.** Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see United States v. Leon, 468 U.S. 897, 919 n.20 (1984); McSurely v. McClellan, 697 F.2d 309, 318-21 (D.C. Cir. 1982). Chester's Affidavit demonstrates that she was aware that she was so heavily overworked that she could

not properly care for her "wards" over whom she had custody. (R. 10, pars. 43, 44, 46, 47; see pp. 8-9 above.)

Moreover, the official duty to protect members of the target class from increased risk of harm, is a clearly established duty, so that there is no discretionary act immunity for an official to act in such a way that enables or increases that risk of harm to the target group, to come to pass. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985); Davis v. Fulton County, Ark., 884 F.Supp. 1245, 1261 (E.D. Ark. 1995); Freeman v. Ferguson, 911 F.2d 52 (8 Cir. 1990); Dunn v. Carroll, 40 F.3d 287, 293 (8 Cir. 1994).

5. The Complaint was dismissed in violation of due process of law by application of Wisconsin legislation making strict compliance with the statutory notice requirement a jurisdictional prerequisite to a suit against the State (Wisc.Stat.Ann. § 893.82), while actual notice (which was given here) - even absent strict compliance with the notice requirement - is expressly sufficient to maintain a suit against any other governmental unit/agency (§ 893.80(1)).

There was actual notice, and substantial compliance with Wis. Stat. Ann. § 893.82. The 7th Circuit improperly held that lack of strict compliance with the notice requirement of that statute is fatal to the claim. (App. A, pp. 11-12)

Two Wisconsin statutes regulate notice of claims to governmental units - § 893.82 as to the State, and § 893.80 re all other governmental bodies and political subdivisions. While strict

compliance is required re the State per § 893.82, it is expressly not required as to the other governmental units per § 893.80(1). Here, the notice given would have satisfied the notice requirement as to all governmental units other than the State. Due process was denied when the notice here was held defective, where an identical notice would have been sufficient as to any other governmental body. Due process will not countenance depriving a citizen of a crucial right in an irrational manner.

C O N C L U S I O N

For any and all of the foregoing reasons, certiorari should be allowed.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 95-3398

AARON D. WEINBERGER, as administrator of the Estate of JEREMIAH BENJAMIN WEINBERGER, AARON DAVID WEINBERGER, as father of Jeremiah Benjamin Weinberger,

Plaintiff-Appellant,

v.

STATE OF WISCONSIN, DONNA CHESTER, Probation Officer and as yet unnamed probation officers and employees,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 94 C 574—**Barbara B. Crabb**, *Chief Judge*.

ARGUED APRIL 18, 1996—DECIDED JANUARY 31, 1997

Before CUDAHY, RIPPLE and KANNE, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Jeremiah Benjamin Weinberger was murdered by Jeffrey Dahmer. Aaron David Weinberger, the father of Jeremiah Weinberger and administrator of his estate, brought this civil rights action pursuant to 42 U.S.C. §§ 1983, 1985 and 1986 against the State of Wisconsin, Dahmer's probation officer Donna

Chester, and other unnamed probation officers and employees. Mr. Weinberger alleged that the defendants acted unreasonably, in a grossly negligent manner, and with reckless disregard for the safety of persons in the class of Dahmer's abuse victims by mismanaging Dahmer's supervision. The district court granted the defendants' summary judgment motion; it also dismissed the claim against the unnamed state officers. Mr. Weinberger now appeals. For the reasons that follow, we affirm the judgment of the district court.

I
BACKGROUND

A. *Facts*

On or about July 6, 1991, Jeremiah Benjamin Weinberger was murdered by Jeffrey Dahmer. Jeremiah's father, the administrator of his son's estate, alleges that the conduct of the defendants in supervising the probation of Jeffrey Dahmer caused and precipitated Dahmer's murderous act. His central allegation is that the defendants "violated their own rules and procedures for supervising criminals under order of probation, in not visiting the apartment or residence of Jeffrey Dahmer as they had an obligation to do while he was on probation." R.27 ¶ 3. As a result, Mr. Weinberger alleges, Dahmer was encouraged to commit murderous acts, including the murder of plaintiff's son.

Mr. Weinberger focuses on the conduct of Dahmer's probation officer, Donna Chester. Donna Chester, a probation and parole agent for the State of Wisconsin, assumed that position on January 9, 1990. After initial agent's training, she was placed in the Sex Offender Unit in Milwaukee. On March 9, 1990, Officer Chester was assigned the caseload of a departing agent. One of the 121 active cases was the case of Jeffrey Dahmer. Dahmer

had been convicted of second degree sexual assault and of enticing a child for immoral purposes; the victim was a thirteen year-old boy. For these crimes, he had been sentenced, on May 24, 1989, to one year in the Milwaukee House of Correction (with work release privileges) and to five years of probation. Dahmer's probation required alcohol treatment and forbad contact with anyone under the age of 18.

Officer Chester met with Dahmer from the time of his release in late March or April 1990 until July 18, 1991. After that date, he was arrested and his probation revoked. During the time that she supervised Dahmer, Officer Chester met with him approximately twice a month. Her bimonthly appointments with Dahmer lasted from 10 minutes to 1 hour, usually for more than half an hour. She stated in her affidavit that she "tended to spend more time in counseling with Dahmer than average for [her] clients." R.10 ¶ 10. They discussed such concerns as his sexual orientation, money difficulties, bankruptcy considerations, holidays with his father and brother, fears about the dangerousness of his neighborhood, and depression. As the district court set forth in detail, *see Weinberger v. Wisconsin*, 906 F. Supp. 485 (W.D. Wis. 1995), Officer Chester arranged his enrollment in an out-patient alcohol treatment program at the DePaul Rehabilitation Hospital, which lasted from May 22 to November 10, 1990. Dahmer met the DePaul counselor from one to three times a week and had access to a psychiatrist and psychologist. The counselor reported regularly to Officer Chester that Dahmer was fully cooperative and seemed to be making progress. Officer Chester also arranged for Dahmer to be seen in the probation office's clinical services program, which included appointments with a psychiatrist, and in the Milwaukee Mental Health Complex. She referred him to money management agencies and monitored his progress, but left him to take some initiative and responsibility by

carrying through on the first contacts she made. She later referred him to a support group for gay men at the Counseling Center. However, her attempt to enroll Dahmer in a sex offender treatment program failed; he was rejected because his crime did not fit the typical scenario of the child molester.

Dahmer was a compliant client, "one of the most cooperative clients [Officer Chester] ever worked with." R.10 ¶ 17. He was employed at the Ambrosia Chocolate Company nearly the entire time Officer Chester was in contact with him. He created almost no problems; he missed or was late for only one or two appointments and his urine tests were always negative for alcohol.[1] When Officer Chester believed it was necessary to have an assessment of Dahmer, she ordered him to go for an evaluation. In October 1990, the probation officer arranged for Dahmer to see a psychiatrist at DePaul. As usual, he complied, but told Officer Chester that he could not afford the anti-depressant medication prescribed. She then advised him concerning his money-spending habits, his lack of priorities and negative attitude. However, after her May 13, 1991 appointment with Dahmer, in which he told her of a strangling in his apartment complex and his desire to move from there, she did more than advise him: She contacted the ABC Budget Company for him.

On May 27, 1991, Officer Chester arranged an evaluation of Dahmer with a consulting psychiatrist, Dr.

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[1] In September 1990, one urine test (of the three he took each week) came back positive for valium. R.10 ¶ 11. Officer Chester ordered Dahmer to appear at her office, demanded an explanation and ordered a second urine analysis. When Dahmer told her that the medication was left over from a prior treatment, she warned him to cease taking any medication not currently prescribed. The result of the second test was negative.

Crowley. The assessment revealed no serious mental disorder, no indication of dangerousness to himself or others, and no suggestion that she should spend additional effort with Dahmer. Dahmer continued to see Dr. Crowley; at his July 8 appointment with Officer Chester, Dahmer told her that he was making progress with the psychiatrist. Nevertheless, he reported a concern that he might be fired for missing work and talked about suicide. Officer Chester counseled him regarding his employment problem; however, because he seemed fully functional, she believed she did not have grounds to seek commitment or otherwise to detain him.

Dahmer missed his July 10 appointment with Dr. Crowley and did not immediately notify Officer Chester about this lapse. When he called Officer Chester on July 16 to tell her that he had lost his job two days before and that he was depressed and drinking beer, she ordered him to report to her office as soon as possible and made an appointment for him to see Dr. Crowley the same day. Dahmer called Officer Chester to tell her that he had slept through his appointment with Dr. Crowley; however, he did report to Officer Chester's office on July 18 and again talked about committing suicide. Officer Chester counseled him concerning his employment problems and called the Salvation Army to assist him with food and shelter. Dahmer then went to his make-up appointment with Dr. Crowley that day. Dr. Crowley's progress notes indicated that Dahmer had been feeling better before he was terminated from his job. The physician prescribed a medication for anxiety and advised Dahmer to return in a week. He did not recommend that Officer Chester supervise Dahmer more closely or take any other actions.

On July 23, 1991, Officer Chester was informed that Dahmer had been arrested the day before for various homicides. In her affidavit, the probation officer states:

"Up to this point in time I had no legitimate or lawful grounds under departmental policies and rules to take Dahmer into custody or to revoke his probation." R.10 ¶ 40. After Dahmer's arrest, Officer Chester learned, for the first time, that he had violated his parole by failing to report a contact with the police on May 27, 1991 and by making an unauthorized trip to Chicago on June 30, 1991. These two violations were the basis for the revocation of Dahmer's parole. Officer Chester also stated that she "never had any grounds to take any disciplinary action against Dahmer or to suspect that home visits would have been of material benefit in his supervision." *Id.* ¶ 42.

Officer Chester did not make any home visits to Dahmer. She requested permission to forego these visitations from her supervisor and received the requisite permission.

B. *Ruling of the District Court*

The district court granted the motion for summary judgment filed by the State of Wisconsin and Donna Chester. *Weinberger v. Wisconsin*, 906 F. Supp. 485, 494 (W.D. Wis. 1996). It held that the state was immune from suit, *id.* at 488, and that Officer Chester also shared that immunity insofar as she was sued in her official capacity. The claims brought under §§ 1985 and 1986 were dismissed for failure to state any facts that would support such a claim. The district court also dismissed the case against the unnamed defendants for failure to make timely identification of them. *Id.* at 494.

The court then turned to the allegation that, in her individual capacity, Officer Chester had deprived plaintiff's son of due process of law by her failure to make home visits. In determining that this claim must fail, the court first held that Mr. Weinberger had not established

the basic causal premise that his son would not have been killed if Dahmer had not had the privacy of his apartment and the knowledge that he would not have been interrupted by a visit from his probation officer. In this regard, Mr. Weinberger had failed to establish, noted the district court, that Dahmer knew either that the probation officer would not visit the apartment or that any such visits would have been unannounced. Nor, continued the court, did Mr. Weinberger ever establish that the failure to visit the apartment either created or increased the harm to, or vulnerability of, Dahmer's victims. Finally, the court noted that there was no evidence that Officer Chester ever knew of a substantial risk of serious harm to any of Dahmer's victims. Dahmer's compliance with the conditions of probation and the reports that she received from the experts to whom she had referred him gave her no reason to believe that he was dangerous or that a visit to his home was necessary to verify the absence of any illegality.

The district court then elected to retain jurisdiction over the state claim, but dismissed this claim for failure to comply with the statutory notice provision. Alternatively, the court held that Officer Chester was protected by the doctrine of official immunity because of the discretionary nature of her duties.

II

DISCUSSION

A.

Summary judgment is appropriate when there are no genuine issues as to any material fact and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment initially must inform the district court of the basis for its motion; the party also must identify the record portions

and the affidavits, if any, which it believes demonstrate the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). The party opposing the summary judgment motion "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). To defeat the motion, the non-movant must show there is a genuine issue or dispute of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment must be entered. *Celotex*, 477 U.S. at 322. We review the district court's grant of summary judgment de novo. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).[2]

B.

We believe that Mr. Weinberger's claim under the Due Process Clause of the Fourteenth Amendment requires that we address but one issue.[3] Assuming that the other

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[2] As a threshold matter, we agree that the district court properly dismissed the claims against the State of Wisconsin and Officer Chester in her official capacity. These suits are barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). No showing has been made that the Attorney General had the authority to waive the State's Eleventh Amendment immunity by removal. *See Estate of Porter v. Illinois*, 36 F.3d 684, 690 (7th Cir. 1994). We also agree that the district court did not abuse its discretion in denying leave to amend the complaint to identify the additional parties.

[3] Although unnecessary for our decision, we also note, as did the district court, that there is no evidence in the record to indicate that occasional home visits would have deterred Dahmer or would have lessened any risk to plaintiff's son.

(continued...)

prerequisites are met, it is well established that a cause of action alleging a violation of the Due Process Clause can be sustained only if it is established that the defendant's actions can be characterized as reckless. *Archie v. City of Racine*, 847 F.2d 1211, 1219-20 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065 (1989). "[B]y reckless or deliberately indifferent conduct, we mean conduct that is criminally reckless—that is, conduct that reflects a complete indifference to risk such that we can infer the actor's knowledge or intent." *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). Negligence by state officials does not violate the Due Process Clause of the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (inmate injured slipping on pillow negligently left on stairway by prison official was not deprived of due process of law); *see DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989) (failure of state or local governmental official to prevent child abuse by private actor is not due process violation).

Mr. Weinberger submits that Officer Chester is an inexperienced state probation officer who was reckless in accepting 121 cases involving high-risk sexual offenders and in not making statutorily-required home visits. He contends that her failure to make home visits enhanced the danger to a cognizable, at-risk group: namely, young minority homosexual males. According to Mr. Weinberger, because Officer Chester's course of conduct was never to make home visits, Dahmer reasonably would have known that she would not make home visits. In this way, she endangered persons and precipitated Dahmer's actions.

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[3] (...continued)

We also note that, although we need not reach the issue, Officer Chester would be permitted the defense of qualified immunity with respect to this due process allegation.

We cannot accept this submission. In our view, the record simply will not support a determination that Officer Chester's conduct was reckless. The administrative code section governing parole/probation supervision allows probation officers to establish probation conditions designed to "achieve the goals and objectives" of probation. Wis. Admin. Code § DOC 328.04; *see Felce v. Fiedler*, 974 F.2d 1484, 1495 (7th Cir. 1992). The particular administrative rule at issue, § DOC 328.04, sets forth the requirement that a probation officer shall monitor a client according to the designated level of supervision. Dahmer was a client under maximum supervision:

> (a) *Maximum.* Maximum supervision shall require a minimum of one face to face contact with the client by a representative of the department every 14 days. Home visits shall be made at least once every 30 days unless this requirement is waived by a supervisor in writing . . . .

As the administrative code provides, Officer Chester properly submitted requests for home-visit waivers to her supervisor, James Wake (who is not a defendant). Supervisor Wake approved and executed the waivers after considering such factors as favorable supervision adjustment, stability of residence, agent workload and potential danger to the agent. Officer Chester explained in her affidavit that she reviewed Dahmer's case with her supervisor before he authorized the waiver:

> Of importance in our discussions were the facts that: a) Dahmer displayed a lower risk profile than did the typical client in the Sex Offender Unit; b) Dahmer, in contrast to the typical sex offender, had a stable employment history; c) the crimes for which he was convicted were not overtly violent; and d) Dahmer was very compliant with probation rules and other instructions [Officer Chester] gave him.

R.10 ¶ 44. The record in this case supports Officer Chester's statements. She offered reasonable bases for her decision to request waivers of home visits; her superior agreed with her assessment. The waiver was validly issued. None of the several mental health care professionals who were treating Dahmer while he was on probation suggested that he was dangerous or needed additional supervision.

The conduct described in the record and summarized in the preceding paragraphs is hardly the basis for a determination of recklessness. Indeed, it would be difficult to make a case for the proposition that the record would support a jury question for the breach of even a lesser standard of care.

C.

1.

The district court granted summary judgment to Officer Chester on the state law claims because plaintiff failed to allege that he had filed a notice of claim that complied with Wis. Stat. § 893.82 and because the notice he filed did not comply with the statute. Mr. Weinberger submits on appeal that there has been sufficient, substantial compliance with the statute. He asserts that he presented the "gist of the claim" within the 120-day statutory time period and that he merely failed to identify which employee was involved in the conduct for which he sought to bring suit. He claims that the state had to provide the identity of that employee.

Section 893.82 sets forth the requirements by which a plaintiff gives notice of injury. It requires that the notice be filed with the Attorney General within 120 days of the "act" of a state officer, employee or agent in the discharge of his or her duties. A complaint that fails to show compliance with § 893.82 fails to state a claim upon which relief can be granted. *Yotvat v. Roth*, 290

N.W.2d 524, 527 (Wis. Ct. App. 1980). Section 893.82 is jurisdictional and *strict* compliance is required. *Ibrahim v. Samore*, 348 N.W.2d 554, 557-58 (Wis. 1984) (stating that the statute imposes a condition precedent to the right to maintain an action). There is no equitable basis for partial or "substantial" compliance, as Mr. Weinberger would wish. *See Oney v. Schrauth*, 541 N.W.2d 229, 233 (Wis. Ct. App. 1995). Whatever reason Mr. Weinberger may offer for his inability to comply, the fact is that noncompliance is fatal to the claim. *See Peckham v. Spitz*, No. 96-1827, 1996 WL 710914, at *2 (Wis. Ct. App. Dec. 12, 1996).

2.

Finally, we agree with the district court that Officer Chester is immune under state law from individual liability with respect to the state law claims. The Wisconsin Supreme Court has made it clear that the responsibilities of a parole officer are discretionary and therefore subject to immunity. *C.L. v. Olson*, 422 N.W.2d 614 (Wis. 1988). As our earlier discussion makes clear, Officer Chester's actions were not "malicious, willful, or intentional." *Id.* at 710.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

App. 13

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 17, 1997

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

AARON D. WEINBERGER, as administrator of the Estate of JEREMIAH BENJAMIN WEINBERGER, AARON DAVID WEINBERGER, as father of Jeremiah Benjamin Weinberger, Plaintiff-Appellant,	]	Appeal from the United States District Court for the Western District of Wisconsin.
No. 95-3398 v.	]	No. 94 C 574
STATE OF WISCONSIN, DONNA CHESTER, Probation Officer and as yet unnamed probation officers and employees, Defendants-Appellees.	]	Barbara B. Crabb, Judge.

O R D E R

On consideration of the petition

for rehearing and suggestion for rehearing en banc filed on February 25, 1997 by the plaintiff-appellant, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby DENIED.

Supreme Court, U.S.
FILED

(2)

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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

AARON DAVID WEINBERGER, as Administrator of the Estate of JEREMIAH BENJAMIN WEINBERGER; AARON DAVID WEINBERGER, as father of Jeremiah Benjamin Weinberger,

Petitioner,

vs.

THE STATE OF WISCONSIN, PROBATION OFFICER DONNA CHESTER and as yet unnamed probation officers and employees,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL APPENDIX

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Chicago, Illinois 60606
(312) 641-0692
Attorney for Petitioner

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SUPPLEMENTAL APPENDIX

Supp. App. 1

[p. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WISCONSIN

- -

[dated: September 28, 1995]

AARON D. WEINBERGER,
as administrator of the Estate of
Jeremiah Benjamin
Weinberger, AARON
DAVID WEINBERGER, as
father of Jeremiah
Benjamin Weinberger,

OPINION AND ORDER

Plaintiff,

v. 94-C-0574-C

THE STATE OF WISCONSIN,
PROBATION OFFICER
DONNA CHESTER and
as yet unnamed
probation officers
and employees,

Defendants.

- -

This is a civil case brought pursuant to 42 U.S.C. § 1983, 1985 and 1986 and Wisconsin state law in which

plaintiff Aaron David Weinberger is suing as administrator of his son's estate and as the father of one of the victims of Jeffrey Dahmer's horrific crimes. Plaintiff contends that defendants acted unreasonably, in a grossly negligent manner and with reckless disregard for the safety of persons in the class of Dahmer's abuse victims by mismanaging Dahmer's supervision. Specifically, plaintiff alleges that defendant Donna Chester failed to visit Dahmer's residence as she was required to do while he was on *[p. 2]* probation, failed to act on indications that Dahmer was about to have a nervous breakdown and would engage in abuse again, failed to make

any attempts to obtain counseling for Dahmer. Plaintiff alleges that defendant did not want to visit Dahmer at his apartment because he lived in a racially-mixed neighborhood and that as a direct result of defendant Chester's failure to make such visits, Dahmer was encouraged to commit murders in his apartment because he had no reason to fear he would be visited there by his probation officer. Plaintiff is seeking in excess of $50,000 from the state of Wisconsin and its employees, particularly defendant Chester and her yet unnamed supervisors.

Defendants have moved for summary judgment, contending that any action against the state and its employees in

their official capacities is barred by the Eleventh Amendment, that the action against the yet unnamed defendants is barred by plaintiff's failure to identify them in a timely fashion, that the complaint fails to state a cause of action against defendant Chester in her individual capacity and that, if it does state a claim, she is entitled to qualified immunity, that the state law causes of action are barred by plaintiff's failure to plead the filing of a timely notice of claim pursuant to Wis. Stat. § 893.82 and by sovereign immunity and that the doctrines of res judicata and collateral estoppel bar the prosecution of the federal claims asserted in the complaint. Defendants

argue also that plaintiff should be held to a heightened standard of pleading if the doctrine of qualified immunity is to have any meaning although they do not explain what relevance such an argument has to a motion for summary *[p. 3]* judgment. I consider it irrelevant and have not addressed it.

I conclude that judgment must be granted to defendants because the state is immune from suit, because plaintiff has never identified the "as yet unnamed probation officers and employees," because the undisputed facts show that plaintiff has no constitutional claim against defendant Chester and because plaintiff's state law claims are barred by his failure to plead the filing of a

timely notice of claim as well as by the state's doctrine of official immunity. It is unnecessary to reach defendants' arguments regarding qualified immunity under federal law, collateral estoppel or res judicata.

From the findings of fact proposed by the parties, I find that there is no genuine issue with respect to the following material facts.

UNDISPUTED FACTS

Plaintiff is the father of Jeremiah Benjamin Weinberger and the administrator of his estate. Jeremiah was murdered by Jeffrey Dahmer on or about July 6, 1991. More than two years earlier, on May 24, 1989, Dahmer had

been convicted of second degree sexual assault and enticing a child for immoral purposes, both with a thirteen year old boy, and had been sentenced to one year in the Milwaukee House of Correction and five years' probation.

Defendant Donna Chester was Dahmer's probation officer from on or about March 9, 1990 until on or about July 23, 1991. A graduate of the University of Wisconsin-Milwaukee *[p. 4]* School of Social Welfare with a major in criminal justice, she became a state probation and parole agent on January 9, 1990, and was assigned to the Milwaukee Sex Offender Unit on February 25, 1990. In March 1990, after her training, she took over the entire 121 active cases of

a departing agent. All of the clients assigned to her were sex offenders, of whom about two-thirds to three-fourths were considered to be high-risk and at maximum supervision levels. (As a general rule, sex offenders are considered to be of higher risk than other types of offenders.) In addition, defendant had approximately twenty-five "institution cases" (institutionalized clients in "preparole" status) that required substantial amounts of her time and considerable paperwork.

Defendant saw Dahmer approximately twice a month, helped him to enroll in an out-patient alcohol treatment program at the DePaul Rehabilitation Hospital, made multiple attempts to refer him for counseling to the department's clinical

services program, where he was eventually in treatment with a psychiatrist, referred him to the Milwaukee Mental Health Complex and to various money management agencies, monitored his progress in these programs and helped him to take responsibility for making corrections in his own life. During the appointments, defendant discussed Dahmer's concerns or issues she thought needed addressing. The appointments lasted from ten minutes to an hour, with most of them being more than half an hour.

One of defendant's priorities was getting Dahmer into alcohol abuse treatment because *[p. 5]* the court had ordered such treatment as a condition of probation. Dahmer blamed his problems

on alcohol and Dahmer's father had emphasized the importance of addressing Dahmer's alcohol abuse. Defendant obtained Dahmer's admission to an intensive out-patient alcohol abuse program at DePaul Rehabilitation Hospital that lasted from May 22 through November 15, 1990. She had no reason to believe, either from his file or from her own contacts with him, that Dahmer had a drug abuse problem. Dahmer met with his DePaul counselor one to three times a week as he progressed through the program. He had access to a psychiatrist and a psychologist through DePaul upon referral by his counselor. Defendant had regular contact with Dahmer's counselor, who reported that Dahmer was fully cooperative and seemed

to be making progress. She received no indication from the staff at DePaul that Dahmer seemed dangerous or that he was relapsing into criminal activity. She learned from the staff on November 15, 1990, that Dahmer had completed the program successfully.

On about August 13, 1990, defendant became concerned that Dahmer was depressed. She discussed a referral to the Clinical Services Unit of the Department of Corrections with the unit psychologist, Joan Kojis, who informed her that since Dahmer was employed, had insurance and was already in treatment at DePaul, he should be referred to the clinician there. Sometime later, Dahmer's counselor at DePaul called defendant, recommended that Dahmer see a

psychiatrist for depression and set up an appointment for Dahmer with a doctor at DePaul. *[p. 6]*

On or about August 27, 1990, defendant referred Dahmer to the Milwaukee County Mental Health Complex for evaluation and treatment. She called to arrange for an assessment and was told Dahmer would have to come in and could not make an appointment. On September 4, defendant instructed Dahmer to go to the mental health complex.

The only problem DePaul staff reported to defendant was that one of Dahmer's thrice weekly urine tests came back positive for Valium on September 10, 1990. Defendant ordered him to appear in her office. He claimed the drug was residual medication from prior

treatment; a second urinalysis was performed and the result was negative. Defendant warned Dahmer to stop taking any medication unless he had a current prescription, to go to the Milwaukee County Mental Health Complex for an evaluation and to bring in verification. On October 8, 1990, Dahmer went in for an evaluation. He informed defendant he did not have the $200 required for the assessment and that he would be expected to pay for treatment thereafter. Defendant discussed treatment for Dahmer with the department's Clinical Services Unit because his depression seemed worse. The psychologist in the unit said again that it would be more appropriate for Dahmer to be referred to a DePaul clinician since he was in

treatment there.

On about October 23, 1990, defendant learned that Dahmer had seen a psychiatrist at the DePaul facility. No one on the DePaul staff advised defendant that Dahmer was dangerous, that his level of supervision should be increased or that she should do anything in *[p. 7]* addition to what she was doing already. Dahmer told her that the doctor had prescribed anti-depressant medication but he could not afford it. This prompted a counseling session in which defendant told Dahmer that he must change his negative behavior and attitude about money, prioritize his needs and spend money on necessities rather than on the things he wanted.

Dahmer was employed at the Anbrosia

Chocolate Company during most of the time he was on probation. He rarely missed appointments with defendant or with the people to whom he was referred. He was compliant with the goals and objectives of probation supervision and was one of the most cooperative clients defendant worked with.

Dahmer denied consistently that he drank alcohol and his urine tests at DePaul were always negative for alcohol. He told defendant he attended Alcoholics Anonymous meetings occasionally. At a meeting on November 5, 1990, Dahmer discussed bankruptcy with defendant as a means of dealing with his debts. He told her he would be able to get cheaper anti-depressant medication from his DePaul therapist.

After Dahmer's completion of the course of treatment at DePaul on November 15, 1990, he told defendant he would continue to see the psychiatrist there regarding depression and sexual issues and that he was taking the prescribed medication. This was confirmed by DePaul staff on December 4, 1990. They noted that Dahmer was one of their most cooperative clients and that he had missed only one appointment. In February 1991, Dahmer *[p. 8]* missed an appointment with defendant for the first time. He called to apologize and came in voluntarily a week before his next scheduled appointment. He reported that he was managing to obtain his medication and that he was not drinking. Defendant referred him to a support group for gay

men at the Counseling Center. In March, defendant contacted the counseling center in an effort to enroll Dahmer in sex offender treatment. The center declined to accept Dahmer because his crime did not fit the typical scenario of child molestation. In light of this rejection and the fact that Dahmer's treatment at DePaul had stopped, defendant tried again in May 1991 to obtain clinical services for Dahmer from the department's Clinical Services Unit. Dahmer was given an appointment for June 11 with Dr. Crowley, consulting psychiatrist for the department. Dr. Crowley found no serious mental disorder and only mild depression and gave Dahmer a voucher for psychiatric medication. He said nothing in his report to

indicate potential dangerousness and made no suggestions for defendant.

On June 24, 1991, Crowley saw Dahmer again. Dahmer reported no significant problems, either with depression or otherwise, and made an appointment to see Crowley on June 27. Dahmer met with defendant on July 8 (two days after he had murdered Jeremiah Weinberger) and reported he was making progress with Dr. Crowley, that he was concerned he would be fired for missing work and for being late and that he was contemplating committing suicide if he lost his job. Defendant did not believe Dahmer was suicidal; in fact, he seemed to her to be fully functional. She concluded she had no legal grounds on which to *[p. 9]* seek civil commitment.

She counseled Dahmer on his employment problems, knowing he had an appointment with Crowley two days later.

During his sessions with Dahmer, which continued until July 18 (four days before Dahmer was arrested), Crowley saw no evidence of dangerousness and never recommended to defendant that she provide closer supervision or take any other steps in addition to those she was already taking.

Defendant never had grounds to take disciplinary action against Dahmer or to incarcerate him. Given Dahmer's compliance with supervision, his follow up on referrals, his steady employment, his involvement in treatment, the lack of any reports of violent or illegal behavior or of police contacts and the

absence of any warnings of problems from any of the experts treating him, defendant Chester had no reason to believe he required close *[sic.]* supervision. She submitted four requests for waivers of home visits, citing workload adjustment as the reason. These requests were approved by her supervisor, James Wake, on May 1, 1990, June 1, 1990, November 29, 1990 and June 17, 1991. Defendant never made any visits to Dahmer's residence. All of her contacts with him took place in her office or over the telephone.

Jeffrey Dahmer's modus operandi was to lure his victims to his apartment, where he drugged and then killed them in the course of or before performing sexual acts. He dismembered his victims

and preserved some of the body parts such as skulls or, in some *[p. 10]* cases, entire skeletons. He took elaborate steps to prevent discovery of his crimes, as evidenced by the techniques he developed for disposing of bodies and decreasing odors, his locking the cosmetic case in which he kept one skull and his painting other skulls so that they would appear to be artificial.

Plaintiff filed a notice of claim with the Attorney General for the State of Wisconsin on October 31, 1991, 117 days after the death of his son. The notice alleged that the death was the direct result of the negligent failure to control and supervise the probation of Jeffrey Dahmer by the Wisconsin Department of Health and Social

Services. It did not name any individual employee of the department.

OPINION

Understandably, plaintiff is searching for explanations for the death of his son, although it is unlikely there are any rational ones. His response to the unimaginable evil that Jeffrey Dahmer represents is to search for someone else to blame, some entity or person whose actions can be gauged in logical terms. He has chosen the state of Wisconsin and Dahmer's probation officer, attempting to characterize their actions and omissions in federal constitutional terms. His attempt cannot breach the basic framework of the Constitution, which is designed in large

part as a limitation on the state's power to act, rather than as "a guarantee of certain minimal levels of safety and security." DeShaney v. Winnebago County *[p. 11]* Social Services Dep't, 439 U.S. 189, 195 (1989). The due process clause of the Fourteenth Amendment "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." Id.

At the outset, it is necessary to grant defendants summary judgment on plaintiff's assertions of liability against the state and against defendant

Chester in her official capacity. Under the Eleventh Amendment, a state cannot be sued in federal court unless it has consented to suit or Congress has made an explicit abrogation of immunity. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98, 99 (1984). Neither exception is applicable in this case. The state has not given its consent to suit and Congress has never abrogated the states' immunity to suit under the civil rights statutes. To the extent that plaintiff is suing defendant Chester other than as an individual, the Eleventh Amendment bar prevents this suit as well because "a judgment against a public official 'in his official capacity' imposes liability on the entity that he represents...." Brandon

v. Holt, 469 U.S. 464, 471 (1985). Defendant Chester may be sued in her individual capacity because the states' immunity from federal suit does not extend to their officials sued for violations of state law, under the legal fiction that illegal acts by state officials are not the acts of the state and do not share in its immunity. Ex parte Young, 209 U.S 123, 159-60 (1908). *[p. 12]*

Plaintiff argues that defendants should not be permitted to assert Eleventh Amendment immunity because they removed this case from state court where the Eleventh Amendment would not have prevented the prosecution of plaintiff's claim. It is true that the Eleventh

Amendment is a bar to federal jurisdiction, Pennhurst State School, 465 U.S. at 98, and has no operative effect in the state courts, but plaintiff's state court suit against the state and against its employees in their official capacities would have gone aground for other reasons. In state court, the principle of sovereign immunity protects the state from suit without its consent. Moreover, neither the state nor its officials acting in their official capacities can be sued under § 1983 in any court, state or federal, because they are not "persons" under § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Therefore, even if defendants had not removed this case, plaintiff could not

have proceeded against the state or against defendant Chester in her official capacity under § 1983.

Plaintiff has alleged violations of §§ 1985 and 1986 in addition to § 1983 but he has alleged no facts to support his invocation of these statutes. He has neither alleged that a federal officer has been prevented from carrying out his or her duties, § 1985(1), nor alleged a conspiracy to deter any party or witness from attending or testifying in federal court proceedings or conspiring to influence a jury's verdict, § 1985(2)(first clause). He has alleged no facts to support an allegation of a conspiracy to hinder the due course of justice in state courts with an intent to deny equal protection

of the law or a conspiracy to deprive any person *[p. 13]* or class of persons of equal protection of the laws, § 1985(2)(second clause) and (3). Although he has made conclusory statements to the effect that defendant Chester acted with animus or recklessness toward a class of young male homosexuals, these allegations are insufficient to put any material fact into dispute. Plaintiff has no claim under § 1986 unless he has a claim under § 1985, as § 1986 is derivative of § 1985 liability. Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 203 (7th Cir. 1985).

Plaintiff filed his complaint naming unidentified state probation officers and employees in August 1994.

In September, a scheduling order was established, giving plaintiff until November 18, 1994 in which to amend his pleadings. Thereafter, he took no action until February 15, 1995, when he moved for an extension of time in which to respond to defendant's motion for summary judgment. On March 31, plaintiff moved for permission to add two defendants. The motion was denied on the ground that plaintiff had suggested no reason why he could not have filed the same motion within the time allowed for amendment of the pleadings. Plaintiff renewed the motion in May after he had obtained counsel and it was denied again on the dual grounds that he had not shown adequate reasons for his failure to file a timely motion

to amend and he was still unable to identify the persons he would add if permission to amend were granted.

The filing of a lawsuit entails obligations upon the filer who has by his act embroiled others in litigation involuntarily and engaged the limited public resources of the court. *[p. 14]* Primary among those obligations is the commitment of time and resources to the diligent prosecution of the case. Plaintiff has not made that commitment. As his affidavit shows, he has put other concerns ahead of this litigation. It may be that in the scheme of things he has made the right choices for himself and his family, but the fact is that his choices have not advanced this litigation and he must bear the

consequences of them. His suit against the "as yet unnamed probation officers and employees" will be dismissed for his failure to identify them expeditiously.

The important question to be determined is whether plaintiff has succeeded in showing that genuine issues of fact require a trial of his claims against defendant Donna Chester. He has dropped the allegation made in his complaint that defendant failed to take any steps to obtain counseling for Dahmer presumably in light of the undisputed facts to the contrary. He argues instead that defendant's recklessness in accepting an unreasonably heavy caseload, her failure to make a home visit and her failure to recognize that Dahmer's mental condition

was worsening denied his son and himself due process. Presumably he is contending that defendant's recklessly inadequate supervision of Dahmer subjected plaintiff's son to the deprivation of his life without due process of law. Such a contention cannot succeed. Plaintiff's son was not murdered by defendant but by a third person who was not acting on behalf of the state. See Martinez v. California, 444 U.S. 277 (1980) (Fourteenth Amendment protects persons from deprivation of life by the state without due process of law, not against *[p. 15]* the actions of third parties). The Constitution does not create a duty to protect public safety against invasion by private actors. DeShaney, 489 U.S.

at 195. State actors can be liable only if they create the dangerous situation or render the victims more vulnerable to harm. Id. at 201; Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993).

Plaintiff maintains that defendant's failure to make home visits to Dahmer's apartment was an omission by the state that caused the death of his son: the murder would not have occurred had Dahmer not had the privacy of his apartment in which to commit it, knowing that he was safe from any visits there by his probation officer. Not only is the premise for the argument questionable, but plaintiff has shown neither that Dahmer knew his probation officer would not visit him at his apartment nor that her visits would have

been unannounced and thorough, two elements that would be critical in deterring Dahmer from using his apartment for committing murders and storing the remains. Even if it is true that plaintiff's son would not have been murdered but for defendant's failure to visit Dahmer's apartment unexpectedly, her failure is not a cause that has legal significance. See United States v. Feliciano, 45 F.3d 1070, 1074 (7th Cir. 1995) ("A 'but for' cause is only one kind of cause, . . . in fact it often is not deemed a cause at all.") Plaintiff must prove a different kind of cause in order to recover from defendant. He must prove that the supervision of Dahmer created or increased the harm to Dahmer's victims or somehow made them

more vulnerable. In fact, the victims were in no worse position than if the state had never taken on Dahmer's *[p. 16]* supervision. They had not been taken into custody or otherwise limited in their ability to care for themselves and they had not been placed affirmatively into a position of danger they would not have faced otherwise. Reed v. Gardner, 986 F.2d at 1125 (police officers' action in removing one drunk driver and letting another drive home would "not place individuals in a position of danger that otherwise they would not have faced"). See also Losinski v. County of Trempealeau, 946 F.2d 544, 550 (7th Cir. 1991) (deputy sheriff did not violate due process rights of domestic abuse victim who was

shot by husband inside her home while deputy waited outside after accompanying her to her home to retrieve her belongings; deputy's presence did not create danger from victim's husband and state did not force her to go to her home).

Even in the prison setting, where the state has a special obligation to protect inmates from violence at the hands of other prisoners because it "has stripped them of virtually every means of self-protection and foreclosed their access to outside aid," Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994), state officials are liable for injuries committed by other inmates only if they disregard a risk of harm of which they are aware, that is, only if they act or

fail to act despite their knowledge of a substantial risk of serious harm. Id. at 1978-79, 1981. The undisputed facts show that defendant Chester never had knowledge of a substantial risk of serious harm to any of Jeffrey Dahmer's victims. Dahmer's compliance with his supervision gave her no cause to suspect problems and none of the experts who treated him noticed *[p. 17]* anything that led them to suspect he was dangerous. Although defendant knew that Dahmer was a sex offender who might commit another crime, she had no particular reason to believe that he would do so within the privacy of his own home. I conclude that defendant Chester is entitled to summary judgment on plaintiff's federal constitutional

claims because plaintiff has failed to adduce any facts that would support his claim that her actions deprived him and his son of their rights to due process.

With the resolution of all of plaintiff's federal claims, it is within the court's discretion to dismiss the remaining state law claims. Wentzka v. Gellman, 991 F.2d 423, 425 (7th Cir. 1993). Indeed, it is the normal course to do so if the federal claims are dismissed before trial. Id. at 425. However, dismissal is not mandated in every instance. It is not required if, as in this case, the correct disposition of the pendent claims is so clear as a matter of state law that it can be determined without further trial proceedings and without having to

interpret any unsettled area of Wisconsin law. Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993). An additional consideration supports the retention of jurisdiction over the remaining state law claims. Those claims were raised once in federal court in the Northern District of Illinois, refiled in the Circuit Court for Dane County, Wisconsin, and removed from that court to this one. It would be an undue imposition on the parties to require them to go back to circuit court to achieve a final resolution of a case that has lasted too long already. *[p. 18]* Defendant Chester is entitled to summary judgment on plaintiff's state law claims because plaintiff failed to

allege in his complaint that he had filed a notice of claim that complied with Wis. Stat. § 893.82 and because, even if he were allowed to amend his complaint at this late date, the notice he did file did not comply with the statute. Under Wisconsin law, compliance with § 893.82 is a condition precedent to suit. "A complaint which fails to show compliance with the statute therefore fails to state a claim upon which relief can be granted." Yotvat v. Roth, 95 Wis. 2d 357, 360, 290 N.W.2d 524, 527 (Ct. App. 1980). See also Ibrahim v. Sahore, 113 Wis. 2d 720, 726, 343 N.W.2d 554, 557 (1984) ("Failure to give notice is fatal to the action."). Plaintiff's notice of claim was timely but it did not comply with

the statutory requirement that it name "the state officer, employe or agent involved." Plaintiff never identified defendant Chester in the notice of claim, thus depriving the attorney general of the opportunity to investigate the claim against her, as intended by the statute. Id. at 727, 348 N.W.2d at 558 (purpose of § 893.82 is to permit attorney general to investigate a claim against employee that might result in judgment to be paid by state under indemnity statute) (citing Doe v. Ellis, 103 Wis. 2d 581, 589, 309 N.W.2d 375, 378 (Ct. App. 1981); Yotvat, 95 Wis. 2d at 367, 290 N.W.2d at 531).

Even if plaintiff had filed a notice of claim that complied with the

statute, he has failed to show that defendant is not immune from liability under the doctrine of official immunity, which protects public officers from liability "for damages resulting from their negligence or *[p. 19]* unintentional fault in the performance of discretionary duties." Lister v. Board of Regents, 72 Wis. 2d 282, 301, 240 N.W.2d 610, 622 (1976). It is clear that defendant's duties were discretionary. See C.L. v. Olson, 143 Wis. 2d 701, 723, 422 N.W.2d 614, 622 (1988) (parole agent immune from tort liability because his decision to let parolee drive a car involved evaluation of public policies within regulatory framework that required governmental discretion).

Plaintiff has not responded to defendant's assertion of an official immunity defense. It is possible that he would argue that since Wisconsin's official immunity doctrine applies only to damages by public officials resulting from their negligence or unintentional fault, his allegations of defendant's gross recklessness would deprive her of the statute's protection. It is not necessary to decide whether allegedly reckless acts are covered by the doctrine because the undisputed facts show that plaintiff has adduced no evidence that defendant was reckless (or even negligent) in the performance of her duties. The undisputed facts show that defendant acted conscientiously and carefully. She cannot be held negligent

simply because acts occurred that she could not have anticipated in the exercise of ordinary care.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants State of Wisconsin and Donna Chester is GRANTED and the case against defendants "as yet *[p. 20]* unnamed probation officers and employees" is DISMISSED for plaintiff's failure to make timely identification of them. The clerk of court is directed to enter judgment for defendants and to close this case.

Entered this 28th day of September, 1995.

BY THE COURT:

[signed]

BARBARA B. CRABB
District Judge